

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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In the Matter of Notice of	:	CAN-SPAM Act Rulemaking
Proposed Rulemaking and Request for	:	Project No. R41108
Comments Relating to the CAN-SPAM Act :	:	
“Primary Purpose” Standard	:	
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COMMENTS OF THE MAGAZINE PUBLISHERS OF AMERICA

Introduction

On behalf of the membership of the Magazine Publishers of America (“MPA”), we are pleased to submit these comments in response to the Federal Trade Commission’s request for public comment on proposed criteria to be used in determining the “primary purpose” of an electronic mail (e-mail) message under the CAN-SPAM Act Rulemaking, Project No. R411008 (16 C.F.R. Part 316).

MPA is the national trade association for consumer magazine publishers. Its membership includes approximately 240 domestic magazine publishing companies that publish more than 1,400 individual magazine titles, more than 80 international magazine publishers, and more than 100 associate members who are suppliers to the magazine publishing industry. Our member magazines range from well-known, nationally distributed publications to smaller-circulation and local publications.

As noted in our previous comments to the Advance Notice of Proposed Rulemaking (“ANPR”), 69 F.R. 11776 (March 11, 2004), MPA applauds and fully supports the Commission’s efforts to eliminate unwanted, and in particular, fraudulent and deceptive, commercial e-mail messages. Nevertheless, we continue to have concerns with the current

rulemaking process – both with respect to the piece meal fashion in which the Commission appears to be addressing the issues raised by the MPA and other industry members in response to the Commission’s earlier ANPR and with the specific criteria proposed by the Commission for determining the primary purpose of an e-mail message. In addition to filing these comments, MPA has also endorsed a letter signed by a coalition of trade associations that share a common interest in the issues being considered by the Commission in this NPR.

As set forth in greater detail below, among the issues of greatest concern to the MPA are the following:

A. First Amendment Implications of Applying the CAN-SPAM Act to Advertiser Supported Electronic Periodicals

The clear intent of Congress in promulgating the CAN-SPAM Act was to protect consumers from unwanted, deceptive and misleading commercial e-mail messages. Under the Commission’s proposed dual purpose analysis, bona fide magazine publishers of electronic editorial content risk having their periodicals classified as “commercial” rather than editorial simply because they are advertiser supported. It is well established that electronic magazines, newsletters and similar editorial content should not be deemed “commercial” in nature simply because it is advertiser supported. Accordingly, the Commission should make clear that the CAN -SPAM Act does not apply to editorial content disseminated by magazine publishers irrespective of whether the content is supported by third party advertisements. MPA notes that the Newspaper Association of America (“NAA”) and the On Line Publishers Association (“OPA”) have submitted extensive comments setting forth the First Amendment arguments against subjecting editorial content to the dual purpose test. MPA supports the arguments made by those associations regarding the First Amendment protections to be afforded to electronic periodicals.

B. Definition of Transactional and Relationship Messages

The Commission should clarify that e-mail messages containing certain transaction or relationship content are per se transactional or relationship messages irrespective of the subject line or format of the e-mail message. In particular, MPA believes that any e-mail sent at the request of a consumer, whether pursuant to a specific request or pursuant to a subscription is by its nature a transactional or relationship message. Specifically, such communications fall within the scope of Subsection (v) of Section 3(17)(A) in that the delivery of the e-mail is itself the delivery of the goods or services that the recipient is entitled to receive under a transaction previously entered into by the recipient. Since the e-mail is being sent to fulfill that transaction, it should be considered per se “transactional or relationship” irrespective of whether and to what extent commercial material is included in the communication.

Similarly, MPA believes that billing statements, statements of account, subscription renewal and similar e-mails that relate to a previous transaction between the consumer and the sender should be considered per se transactional and relationship in nature, irrespective of whether advertising or commercial messages are also included.

Finally, “Forward-to-a-Friend” e-mail messages should likewise be categorized as per se transactional or relationship as they are based upon a personal and private relationship between the sender and the recipient and are certainly not the type of communication Congress intended to regulate.

C. Application of the “Net Impression” Test

MPA continues to believe that the Commission should apply a standard based on the intent of the sender, such as a “but for” test, rather than a test designed to measure the effect of the e-mail message on the recipient. Moreover, even if the Commission were to follow a “net impression” test, MPA is concerned that the criteria proposed by the Commission for

determining the “net impression” are rigid and arbitrary and do not comport with well established Commission precedent which requires that the “net impression” be determined based on the totality of the message. Specifically, by focusing on the subject line and placement of content within an e-mail message as determinative of its status, the Commission has departed from its own precedent regarding the manner in which a net impression should be determined. MPA believes therefore, that e-mail messages which remain subject to the dual purpose test should be evaluated in their entirety and that no one factor such as subject line or placement of advertising copy should be determinative of its status. MPA would support the establishment of a safe harbor based on the criteria proposed by the Commission in the NPR. Under this approach, an e-mail containing both transactional or relationship and commercial content would be deemed per se non-commercial if either (1) the subject line refers to the transactional or relationship content or (2) the transactional or relationship content is placed at or near the top of the message. Similarly, an e-mail message that contains both commercial and non-commercial content would be deemed per se non-commercial if either (1) the subject line refers to the non-commercial content or (2) a consumer would reasonably interpret the body as non-commercial based on a number of factors, such as placement of commercial content proportion of commercial versus non-commercial content, and the type size, graphics, etc. of non-commercial content. If a marketer chose not to avail itself of these safe harbor criteria, then the primary purpose of the e-mail would be determined under the traditional “net impression” test – looking at the totality of the message rather than on any individual element.

D. Clarification of Who is the Sender

As MPA noted in its previous comments in response to the ANPR, the issue of who constitutes the “sender” in the case of multiple advertisers in an e-mail is a critical issue for the industry. While the Commission has apparently elected to defer consideration of this issue to a

later date, MPA is concerned that this issue is so inextricably linked to the “primary purpose” issue, that the Commission would be well advised to consider both issues together.

Detailed Comments

I. Application of the CAN-SPAM Act Must Be Consistent with First Amendment Principles

As the Commission is well aware, the First Amendment limits the government’s ability to regulate or restrict speech, both commercial and non-commercial. Non-commercial speech, such as news, is entitled to the highest level of First Amendment protection, i.e., any regulation thereof is subject to strict scrutiny whereby the regulation must further a compelling governmental interest and the regulation must be the least restrictive way of advancing that interest. See United States v. Playboy Enter. Group, Inc., 529 U.S. 803, 813 (2000). For commercial speech, the government’s ability to regulate is subject to the standard articulated in Central Hudson Gas & Electric Corp. V. Publish Service Commission of New York, i.e., the regulation must directly advance a substantial government interest in a manner that is no more extensive than is necessary to serve the interest. 497 U.S. 557 (1980).

While the CAN-SPAM Act states that there is a substantial governmental interest in regulating commercial e-mail on a nationwide basis, the Commission’s proposed method of determining what is commercial and non-commercial – the “net impression” test – does not adequately protect advertiser supported electronic periodicals, newsletters and other protected forms of speech under the First Amendment.

Indeed, the Commission proposes that e-mail messages containing both editorial and advertising content will be deemed “commercial” if the recipient reasonably interprets either the subject line of the message as advertising or promoting a product or service, or the body of the

message as primarily advertising or promoting a product or service. The Commission then goes on to state that the factors relevant to this interpretation would include the placement of commercial content at or near beginning of the e-mail message, the proportion of the e-mail message dedicated to the commercial content, and the manner in which colors, graphics and type size are used to highlight the commercial content.

In our view, application of these factors could impermissibly regulate speech protected by the First Amendment. There is no question that magazines are fully protected under the First Amendment irrespective of the number of advertisements contained within the publication or the placement of those ads within the publication. One need only look to this season's fall fashion magazines to understand the point. These publications are replete with hundreds of pages of advertisements, many of which appear before a single page of editorial content. Certainly, neither the Commission nor any governmental agency would suggest that the number or placement of these advertisements have any impact on the constitutional status of these publications. Indeed, courts have routinely held that the number of advertisements in a particular publication, and their location therein, are not determinative of the level of First Amendment protection afforded the publication. See Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), cert. denied, 506 U.S. 1087 (1993) (rejecting an argument that a newspaper's acceptance of advertising automatically subjected it to less First Amendment protection than commercial-free publications); Ad World v. Township of Doylestown, 672 F.2d 1136 (3d Cir. 1982) ("[t]he line between commercial and non-commercial speech for First Amendment purposes cannot be drawn by some magic ratio of editorial to advertising content").

Thus, we believe that application of the proposed "net impression" standard could improperly restrict protected speech in contravention of the First Amendment. Accordingly,

such speech – irrespective of any advertisements that may support it -- should be deemed as falling outside the scope of the CAN-SPAM Act. (See Comments of the Newspaper Association of America and the Online Publishers Association concerning the constitutional infirmities of subjecting First Amendment protected speech to the requirements of the CAN-SPAM Act.) MPA urges the Commission to give due consideration to the constitutional issues raised here and in the comments of the NAA and OPA.

II. E-mail Messages Containing Certain Transactional or Relationship Content Should be Deemed Per Se Transactional or Relationship Messages and Not Subject to the Dual Purpose Test

The CAN-SPAM Act authorizes the Commission to modify the current definition of a relationship or transactional e-mail message so as to accomplish the purposes of the Act. 15 U.S.C. § 7702(17)(B).

MPA believes strongly that certain types of messages by their nature are so clearly for a primary transactional or relationship purpose that they should never be classified as “commercial” e-mail irrespective of whether and in what manner such messages may also contain commercial content. These messages include: (a) e-mail containing billing statements or transaction statements, such as confirmations or statements of account, (b) e-mail sent at the recipient’s request; and (c) “Forward-to-a-Friend” e-mails.

A. Billing Statement and Other Transaction Statements

MPA believes that billing statements, statements of account, subscription or renewal notifications and other transaction confirmation e-mails which relate to on-going and/or previously agreed to commercial transaction between the sender and recipient, should be deemed to be presumptively relationship and transactional (and, thus, non-commercial) in nature, regardless of the inclusion of any additional advertising content in such e-mails.

This is consistent with the manner in which these materials are viewed in the non-e-mail context. For example, the United States Postal Service classifies any mailing containing a billing statement as “first class” mail, regardless of whether the mailing also includes advertisements (such as statement stuffers) or the prominence of such advertisements in the mailer. Similarly, the inclusion of a bill, statement of account, subscription or renewal notification in an e-mail message should, in and of itself, be sufficient to classify the e-mail as relationship or transactional in nature, regardless of the inclusion or prominence of any additional advertising content.

B. E-mails Sent at Recipient’s Request

MPA also believes that e-mail messages sent at the request of the recipient logically fall within the definition of a transactional or relationship e-mail message, as they, by their very nature, facilitate or complete a previously agreed-to transaction (i.e., the recipient’s agreement to receive the e-mail in question). Such e-mails should likewise fall outside the scope of the CAN-SPAM Act, regardless of the inclusion of advertising content, so long as they fall within the scope of the request and until such time as the recipient terminates the request.

C. “Forward-To-A-Friend” E-mails

As MPA noted in its previous comments to the ANPR, publishers that communicate with subscribers and other interested individuals will occasionally use “Forward-to-A-Friend” e-mail programs in which recipients of the e-mail are encouraged to forward e-mail messages to their friends or family members who may be interested in the underlying product, service or offer. MPA does not believe that such messages should be considered commercial messages subject to the provisions of the Act. While the content of the e-mail message may refer to a product or service, the individual who is forwarding the e-mail to his or her friend is not the seller of the product or service and therefore is not sending the e-mail for a commercial purpose. Rather the

individual is forwarding the e-mail to his or her friend or family member because that individual reasonably believes, based on a personal relationship with the friend or family member, that the recipient of the e-mail may be interested in the underlying offer. The forwarded e-mail is thus akin to a private communication between the two individuals and is functionally no different from a situation in which an individual forwards a link or web address for a site that may be of interest to the friend or family member. MPA believes that it is proper and appropriate for the Commission to address this issue in the context of the primary purpose analysis and would urge the Commission to expand the definition of “transaction or relationship” message to include such “Forward-to-a-Friend” e-mails and to designate them as per se relationship messages. Otherwise, continued use of such messages is unlikely as it will be practically impossible for individual consumers to comply with the opt-out requirements of CAN-SPAM.

III. The Commission’s Proposed Criteria for Determining the Primary Purpose of Dual Purpose Messages is Problematic

In its proposed NPRM the Commission sets forth three sets of criteria to be applied in determining the “primary purpose” of an e-mail message. Under the Commission’s proposal:

- (1) if an e-mail message contains only commercial content that advertises and promotes a product or service (“commercial content”) the primary purpose will be deemed to be commercial;
- (2) if the e-mail message contains both commercial content and transactional or relationship content the primary purpose will be deemed to be commercial if either (1) a recipient would reasonably interpret the subject line as signaling a commercial message or (2) the transactional or relationship content does not appear at or near the beginning of the message; and
- (3) if the e-mail message contains both commercial content and content that is neither commercial nor transactional or relationship (e.g., editorial) the primary purpose of the message will be deemed to be commercial if either (1) a consumer would reasonably interpret the subject line as signaling a commercial message, or (2) a consumer would reasonably interpret the body of the message as primarily “commercial” based on factors such as placement of the commercial content, the proportion of commercial versus non-commercial content, and the type size, graphics, color, etc. of the non-commercial content.

As discussed above, MPA believes that certain categories of e-mails should either be exempt from the CAN-SPAM Act entirely as inherently “non-commercial” (e.g., editorial) or per se transactional or relationship. With respect to remaining e-mails with dual content, MPA continues to have concerns with the approach proposed by the Commission.

A. The Primary Purpose Should be Determined
 Based on the Intent of the Sender

In proposing the criteria set forth above for determining the “primary purpose” of an e-mail message, the Commission expressly noted that these criteria are based on what the recipient would reasonably interpret the primary purpose of the messages to be.

In its initial response to the ANPR, MPA along with other industry members urged the Commission to adopt a standard that evaluates the status of the e-mail based on the sender’s purpose and motivation and recommended that the Commission adopt a “but for” test under which the message would not be considered commercial if it would not have been sent “but for” the non-commercial content. The Commission expressly declined to adopt such an approach, noting that advertising messages are historically evaluated based on a “net impression” standard.

We respectfully request that the Commission reconsider its position on this very critical issue. While we do not disagree that the “net impression” is the appropriate standard for determining whether advertising is misleading or deceptive under Section 5 of the Federal Trade Commission Act, in this case Congress mandated a primary purpose test not to determine whether the content of the e-mail message is deceptive or misleading, but for the sole purpose of classifying e-mail communications as commercial or not. We continue to maintain therefore, that the “net impression” of the message on the recipient, which by its nature measures “effect”, is not the appropriate criteria for determining the “primary purpose” of a message which by definition is a “purpose” test. In establishing a “purpose” rather than “effects” test Congress

clearly intended the criteria to focus on the intent of the sender rather than on the effect of the message on the recipient. We would urge the Commission to consider an approach more consistent with that legislative intent.

B. The Proposed Criteria for Determining the Primary
Purpose of a Dual Purpose Message are Inconsistent
With a “Net Impression” Analysis

Even if the Commission persists in its belief that the “net impression” standard is the appropriate standard for determining the primary purpose of an e-mail, we respectfully submit that the specific criteria set forth in the NPRM are inconsistent with the traditional “net impression” analysis.

As the Commission itself has noted in the NPRM, it “assesses claims made in advertising by among other things evaluating the entire document. . . . In advertising, the Commission will examine the entire mosaic rather than each tile separately. The Commission looks to the impression made by the advertisement as a whole.” 69 F.R. at 50096. However, the Commission’s proposed criteria follow a different approach. Specifically, under the Commission’s approach, e-mail messages that contain both commercial and transactional or relationship content would be deemed commercial irrespective of the net impression of the message as a whole simply because either (1) the subject line refers to a product or service or (2) the transactional or relationship content is not placed at or near the top of the message. Under these criteria, if a magazine publisher were to send an e-mail to current members notifying them that their subscriptions are about to expire and offering a discount for renewal, the message could lose its transactional or relationship status if either the subject line refers to the discount for renewal or if the discount offer is presented at or near the top of the message. For example, if a magazine publisher were offering a 25 percent discount if the consumer renews by a certain date, and this were the first statement in the e-mail or, alternatively if the subject line referenced a 25

percent discount on renewal, MPA is concerned that under the Commission's criteria such a message could be deemed to be a commercial message even though the primary purpose of the e-mail is clearly to notify subscribers that their subscription is about to expire and to provide renewal instructions. Parenthetically, this is an example of a situation where the "but for" test would clarify that this message has the status Congress intended – transactional or relationship.

A similar analysis applies to the criteria for determining the primary purpose of a message containing both commercial and non-commercial, non-transactional content. For example, in the case of an e-mail with non-commercial, non-transactional content, if either the subject line refers to a product or service or third party advertisements are included at or near the top of the e-mail and/or presented in exciting, eye catching graphics and text, that e-mail could be deemed a commercial message, irrespective of the overall content of the e-mail when viewed in its totality.

While we appreciate that the Commission's proposed criteria may have been designed to provide industry with objective standards for determining the primary purpose of an e-mail message, these criteria have the potential to be rigidly and arbitrarily applied in a manner which would undermine the very nature of a net impression test (which, by definition, requires that the message be viewed in its entirety and that no single element be determinative of its status). Singling out the subject line or placement of content at or near the top of the ad as determinative of the e-mail message's status is equivalent to looking at a single tile rather than at the entire mosaic.

C. **The Commission's Proposed Criteria for Determining the Primary Purpose of Dual Message Should Serve as a Safe Harbor**

While MPA continues to believe that the Commission should adopt a "but for" test in determining the primary purpose of an e-mail message, if the Commission does, in fact, retain

the “net impression” test, then MPA would urge the Commission to follow the standard net impression analysis, and convert the criteria set forth in the NPRM to a safe harbor approach.

Specifically, under the “net impression” test, no single factor such as the subject heading or the placement of commercial versus non-commercial content should be determinative of the e-mail’s status. Rather, a determination as to the primary purpose of the e-mail should be made based on the totality of the message including the purpose and function of the e-mail, the relative importance of the commercial versus the non-commercial or transactional content, the relative placement and presentation of the commercial and non-commercial or transactional elements of the message and whether the consumer would expect to be able to opt out of the message. To the extent that the Commission believes that the criteria it has proposed are useful in evaluating the “net impression” of an electronic communication, MPA believes it would be more appropriate to position those criteria as a safe harbor rather than as determinative of an e-mail’s status. Under this approach, an e-mail message containing both commercial and transactional or relationship content would be deemed per se non-commercial if either (1) the subject line refers to the transactional or relationship content or (2) the transactional or relationship content appears at or near the beginning of the message.

Similarly, an e-mail message that contains both commercial content and content that is neither commercial nor transactional or relationship would be deemed to be per se non-commercial if either (1) a consumer would reasonably interpret the subject line as signaling a non-commercial message or (2) a consumer would reasonably interpret the body of the message as primarily non-commercial based on factors such as placement of the commercial content, the proportion of commercial versus non-commercial content and the type size, graphic, color, etc. of the non-commercial content.

In the event that a marketer chooses not to avail itself of the safe harbor criteria then the primary purpose of the e-mail message would be determined based on the net impression of the e-mail message as a whole.

We believe such a proposal represents an appropriate harmonization of Commission and industry goals. Such an approach embraces the net impression standard favored by the Commission in that the primary purpose is ultimately determined based on the net impression of the e-mail message as a whole on the recipient. Allowing the safe harbor, however, has the advantage of providing some certainty and guidance to the industry by providing a mechanism whereby a marketer can ensure through the design or placement of the e-mail content that the communication will not be deemed to be primarily commercial in nature. Unlike the Commission's approach in the NPRM, however, the marketer could still exercise some flexibility with respect to the content of the subject line and/or the placement of the commercial and non-commercial content in the message without automatically jeopardizing the non-commercial status of the message. In the event that a marketer does not avail itself of the safe harbor provisions, the e-mail would be judged on the basis of the net impression of the entire message on the reasonable consumer.

IV. The Commission Should Address the Multiple Sender Issue

As noted in our earlier comments, MPA is concerned about the potential application of the obligations applicable to "senders" of commercial e-mail messages, particularly in situations where its members' publications are promoted via e-mail messages sent by third party agents or where an e-mail message contains offers from multiple advertisers.¹ We feel strongly that in

¹ Based on the definitions of "sender" and "initiate" found in the CAN-SPAM Act, any and all of the entities whose products or services are advertised in a particular commercial e-mail message could be deemed a "sender" of the

order for CAN-SPAM to be manageable from an industry standpoint, the Commission must clarify the obligations of the various parties in instances where a single commercial e-mail message contains advertisements or promotions from multiple parties or where a party's products or services are contained in an e-mail message over which that party has no control.

We believe that classifying as "senders" all parties whose products or services may be the subject of a single e-mail message imposes unreasonably high costs on these entities with little, if any, benefit to consumers in terms of protection from unwanted commercial e-mail messages. In our view, the Commission should articulate a standard whereby it limits sender obligations with respect to e-mails containing advertisements or promotions for multiple entities to the entity or entities primarily responsible for directing and controlling the e-mail communication.

This threshold issue is inextricably tied to any meaningful analysis of the Commission's proposed "primary purpose" criteria. Unless the Commission addresses the multiple sender issue as part of this rulemaking, and provides industry an opportunity to comment thereon, we believe it will be difficult to fully assess the potential impact of the Commission's primary purpose proposal on industry. As such, we believe the Commission would be well advised to consider both issues together.

Conclusion

We thank the Commission for providing us with the opportunity to submit the preceding comments on behalf of our membership. Our organization is committed to working with the Commission to ensure that its regulations under the Act represent an appropriate balancing of the needs and requirements of the senders and recipients of e-mail communications. If you have any

message and, thus, subject to opt-out and valid postal address provisions of the Act (and any other provisions applicable to senders).

questions or concerns regarding these comments or any other aspects of the MPA, please feel free to contact us.

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